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No. 88-907

In the Supreme Court of the United States

OCTOBER TERM, 1988

RITA M. SKELTON, PETITIONER

v.

ACTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that ACTION, a federal agency, violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by selecting a younger candidate for a position within the agency.

1. In 1984, ACTION published a notice of its intent to hire someone as its Maryland State Program Director. Petitioner applied for the position. At that time, petitioner was 57 years old and employed by ACTION, although she was on detail to the National Center for Municipal Development. Petitioner did not receive the job. ACTION selected Jerry Yates, a 38-year-old member on the staff of ACTION's Vietnam Veterans Leadership Program. Petitioner then filed this action alleging that ACTION violated the ADEA by rejecting her application on the basis of her age. Pet. App. 8a-15a.

The district court granted ACTION's motion for summary judgment (Pet. App. 3a-30a). The court reasoned

that, although petitioner had made out a *prima facie* case of discrimination, ACTION had rebutted any presumption of discrimination by proving a legitimate reason for its employment decision—*i.e.*, the selecting official, Daniel Bonner, thought that Jerry Yates was better qualified (Pet. App. 6a). The court reviewed the evidence and found that petitioner "has utterly failed" to show "—by either direct or indirect evidence—that age was a determining factor in her nonselection" (*ibid.*).

The district court noted that petitioner provided no evidence to show that ACTION's stated reason for its employment decision was a pretext. The court observed: "All [petitioner] has done is to find fault with Mr. Bonner's memory; she cannot seriously believe that she has discredited his testimony that he indeed believed that Mr. Yates was the superior candidate" (Pet. App. 26a). Accordingly, the court concluded that there is no evidence that ACTION's explanation was a "sham and that, in reality, [petitioner] was the victim of prohibited bias" (*id.* at 29a). The court of appeals affirmed "for the reasons stated in the Memorandum Opinion of the district court" (*id.* at 1a).

2. The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

a. The decision below follows the three-step framework for resolving discrimination claims developed by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). That familiar framework provides:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in

> proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-253 (citation omitted).

Here, the district court found that petitioner made out a *prima facie* case and that ACTION "offered a legitimate reason for [petitioner's] non-selection; the selecting official believed that another individual was more qualified" (Pet. App. 6a). Accordingly, the court, in ruling on ACTION's motion for summary judgment, asked whether petitioner had offered any evidence showing that the reason given by ACTION was a pretext (*id.* at 25a-26a). And the court found that petitioner had provided no such evidence (*id.* at 26a-29a). Thus, the court properly entered summary judgment in favor of ACTION.

b. The question presented in the petition is whether a plaintiff who establishes a *prima facie* case may defeat a defendant's motion for summary judgment by showing that the defendant's explanation for its employment decision is "unworthy of credence" (Pet. i). As we explained in our brief in *Harbison-Walker Refractories* v. *Brieck*, cert. dismissed, No. 87-271 (Dec. 12, 1988), the answer to that question is "yes."* But the question posed by petitioner is not presented in this case.

The district court unequivocally found that petitioner had submitted no evidence discrediting ACTION's explanation. The court stated that petitioner "has not

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* We have supplied a copy of our brief in *Harbison-Walker* to petitioner.

presented—and is not prepared to present—any evidence from which a factfinder might conclude that the reasons proferred by [ACTION] for her non-selection are a sham and that, in reality, she was the victim of prohibited bias" (Pet. App. 29a). The court further found that ACTION's reason for denying petitioner's application—the superior qualifications of Mr. Yates—was supported by an objective view of the documentary evidence (*id.* at 28a). Thus, this case does not present the question whether a plaintiff in a discrimination case may withstand a summary-judgment motion by simply showing that the defendant's explanation is false.

To be sure, the district court quoted (Pet. App. 21a) a passage from *Snyder* v. *Washington Hospital Center*, 36 Fair Empl. Prac. Cas. (BNA) 445 (D.D.C. 1984), which seems to hold that a plaintiff must have more evidence of discrimination than proof that the defendant's proffered explanation is untrue. The district court's quotation of *Snyder*, however, is simply dicta in light of petitioner's failure to present any evidence discrediting ACTION's explanation. And in any event, the district court cited *Snyder* for the proposition that "even if a plaintiff were successful in discrediting the defendant's reasons for selecting another, younger candidate, *at least to the extent of showing that those reasons were misjudged or ill-considered,* it does not follow that the plaintiff will have defeated the defendant's motion" (Pet. App. 21a (emphasis added)). Hence, the district court's citation of *Snyder* may well stand only for the unexceptional point that a plaintiff cannot avoid summary judgment by attacking the wisdom of the employer's hiring decision. See, *e.g.*, *Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981) (ADEA may not be used as vehicle for judicial review of business decisions).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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